Supreme Court, U.S.
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No. 08-716 (1)

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In the
Supreme Court of the United States

Watson Chapel School District, *et al.*,
Petitioners

v.

Chris Lowry, *et al*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the Eighth Circuit improperly apply *Tinker v. Des Moines Independent Community School District.*, 393 U.S. 503 (1969) to a case involving a school dress code that was sufficiently specific to prescribe a uniform?

2. Is there a split among the Eighth, Fifth and Ninth Circuit Courts of Appeals concerning the application of *Tinker* to school dress codes?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the Court whose judgment is the subject of the petition is as follows:

Defendants/Appellants and Petitioners: Watson Chapel School District, Charles Daniel Knight, Watson Chapel School District Superintendent, and Henry Webb, Junior High School Principal.

Plaintiffs/Appellees and Respondents Chris Lowry, by, through, and with his Mother, Wendy Crow; Colton Dougan, by, through, and with his Father, Frank Dougan and his Mother, Leigh Dougan; Michael Joseph, by, through, and with his Mother, Heidi Joseph; Wendy Crow; Frank Dougan; Leigh Dougan; Heidi Joseph

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PETITION FOR A WRIT OF CERTIORARI

Watson Chapel School District, Charles D. Knight and Henry Webb respectfully petition for a Writ of Certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Opinion of the Eighth Circuit dated September 2, 2008 is officially reported at 540 F.3d 752 and is reproduced at Appendix pages 1a through 32a. The Memorandum Opinion and Order of the United States District Court for the Eastern District of Arkansas, Pine Bluff Division dated August 22, 2007 is reported at 508 F.Supp. 2d. 713 and is reproduced at Appendix pages 1b through 40b.

JURISDICTION

The Judgment of the United States Court of Appeals for the Eighth Circuit sought to be reviewed was entered on September 2, 2008. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within ninety (90) days of the entry of the Opinion and Judgment sought to be reviewed. This Court has jurisdiction to review the Judgment of the U.S. Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case was brought pursuant to 42 U.S.C. § 1983 claiming violation of Plaintiff's rights to free speech under the First and Fourteenth Amendments.

STATEMENT OF THE CASE

On October 6, 2006 several students of the Watson Chapel School District wore black armbands to school to protest the school dress code. The students and some parents had previously criticized the dress code by addressing the school board; picketed school board meetings; had held rallies and had appeared in local media expressing their dissatisfaction with the District's dress code. The detailed dress code contained a provision that stated "any attempt to defeat the uniformity intended by this policy is prohibited."

The District interpreted this provision to prohibit the use of apparel (black armbands) to attempt to defeat the uniformity of the policy. This was communicated to students. Students who entered the campus on October 6, 2006 wearing black armbands were requested to remove them. Those that did not were disciplined according to the school district's progressive discipline policy. Three students who were disciplined filed this action by and through their parents seeking injunctive relief, money damages and a declaration that their constitutional rights had been violated.

In the District Court, prior to commencing a jury trial, the school district Defendants stipulated that no material disruption occurred as a result of the black armband protest and the District Court, utilizing *Tinker v. Des Moines Independent Community School District.*, 393 U.S. 503 (1969), found that the District had violated the Plaintiffs' constitutional right to free speech. The only issue submitted to the jury relevant to this petition was the amount of damages sustained by the Plaintiffs. The jury returned a verdict in favor of Defendants finding that no damages had been sustained. The District Court, upon motion of the Plaintiff, entered a Judgment for nominal damages, made the temporary injunction permanent and awarded Plaintiffs attorney's fees.

The Eighth Circuit Court of Appeals affirmed the Judgment of the District Court, again applying *Tinker*. The Court of Appeals held that since the black armband protest did not materially disrupt school activities *Tinker* was controlling. Defendant/Appellants argued to both the District Court and the Eighth Circuit Court that *Tinker* was an incorrect precedent because the school district's detailed dress code, unlike the facts of other cases that have applied *Tinker* to dress codes,[1] constituted a prescribed uniform. This uniform is the functional

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[1] *Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006); *Newsom v. Albemarle County School Board*, 354 F. 3d 249 (4th Cir. 2003); *Barr vs. Lafon*, 538 F.3d 554 (6th Cir. 2008).

equivalent of school sponsored speech discussed in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) and *Morse v. Frederick*, _____ U.S. _____, 127 S.Ct. 2618 (2007) requiring analysis of whether the District restrictions were reasonable under the circumstances and advanced legitimate pedagogical concerns.

The Watson Chapel School District Defendants petition this Court for review of the Eighth Circuit's decision holding that *Tinker* is controlling precedent in this case.

REASONS FOR GRANTING THE PETITION

I. Did the Eighth Circuit improperly apply *Tinker v. Des Moines Independent Community School District.*, 393 U.S. 503 (1969) to a case involving a school dress code that was sufficiently specific to prescribe a uniform?

This Court in *Tinker* stated "the problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair styles or deportment." 393 U.S. at 507-508. Where, as here, the dress code is sufficiently detailed to prescribe a school uniform, the overall appearance of the students is school sponsored speech. Decisions concerning the dress code should appropriately be governed by the analysis provided by this Court in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) and later ratified by *Morse v. Frederick*, _____

U.S. _____, 127 S.Ct. 2618 (2007) in that the dress of students wearing the prescribed school uniform bears the Watson Chapel School District's imprimatur.

The State of Arkansas has stated through its statutory enactment of Arkansas Code Annotated § 6-18-102 the importance the state places upon dress codes to the enhancement of the learning environment. The misapplication of *Tinker* to schools that have adopted dress codes can have far reaching effects.

The prioritization of emphasis by the school district on one activity versus another is just the type of discretionary function of local schools that courts should not interfere with. As this Court has noted, "the determination of what manner of speech in the classroom or in the school assembly is appropriate properly rests with the school rather than the federal courts." *Hazelwood*, 484 U.S. at 267. The District, through its school board and administration should be allowed to place greater emphasis on school apparel, even when doing so results in a prohibition against wearing black armbands in protest of the uniform policy. The only protest of the policy that was prohibited was a protest using apparel as the means of protest. School uniforms and apparel bear the indicia of the local school district and are the functional equivalent of school speech rather than personal speech. All students in the District must wear clothing and apparel required by the student apparel policy. Throughout the community,

"students, parents, and members of the public might reasonably perceive [the students' apparel] to bear the imprimatur of the school." *Hazelwood*, 484 U.S. at 271.

II. Is there a split among the Eighth, Fifth and Ninth Circuit Courts of Appeals concerning the application of *Tinker* to school dress codes.

The Fifth Circuit in *Canady v. Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001) relying on the holding in *Hazelwood* and *Bethel School District No. 403 vs. Frazier*, 478 U.S. 675 (1986), found that a lower standard of review than set out in *Tinker* should exist when the restrictions of student expression are "unrelated to any political viewpoint."

> ...Because (1) choice of clothing is personal expression that happens to occur on the school premises and (2) the School Board's uniform policy is unrelated to any viewpoint, a level of scrutiny should apply in this case that is higher than the standard in *Kuhlmeier*, but less stringent than *Tinker*. Both the traditional time, place and manner analysis and the *O'Brien* test for expressive conduct satisfy this requirement. The time, place and manner analysis and the *O'Brien* tests are virtually the same standard of

> scrutiny for the purpose of assessing the validity of the school uniform policy. Thus the School Board's uniform policy will pass constitutional scrutiny if it furthers an important or substantial government interest; if the interest is unrelated to the suppression of student expression; and if the incidental restrictions on First Amendment activities are no more than necessary to facilitate that interest. (Internal Citations omitted).

Canady, 240 F.3d at 443.

The Eighth Circuit's decision is also in conflict with that of the Ninth Circuit opinion *Jacob v. Clark County School District*, 526 F.3d 419 (2007) which held that the *Tinker* standard does not apply to a school dress code. The Ninth Circuit also held that an intermediate scrutiny should apply to determine whether the uniform policy in question either places content neutral restrictions on student's pure speech or places incidental restrictions on student's expressive conduct.

CONCLUSION

This Court should resolve this conflict and make clear the appropriate standard for review of school dress codes that are sufficiently detailed to prescribe a uniform. The number of cases litigating these questions demonstrates the importance and frequency of conflicts arising in this area.

Petitioners respectfully request that this Court grant their petition.

Respectfully Submitted,

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APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 07-3437/08-1139

Chris Lowry, by, through, and with his Mother, Wendy Crow; Colton Dougan, by, Through, and with his Father, Frank Dougan and his Mother, Leigh Dougan; Michael Joseph, by, through, and with his Mother, Heidi Joseph; Wendy Crow; Frank Dougan; Leigh Dougan; Heidi Joseph,	*	
Plaintiffs/Appellees	*	
	*	Appeals from the
	*	United States
	*	District
	*	Court for the
	*	Eastern
	*	District of
	*	Arkansas
	*	

Watson Chapel School *
District; Charles Daniel *
Knight, Watson Chapel *
School District *
Superintendent, in his *
Individual and Official *
Capacities, *
*
Defendants/Appellants; *
*
Charles Daniels, Watson *
Chapel School Board *
President; Sandra C. *
Boone, Vice President, *
in her Individual *
Capacity; Donnie *
Hartsfield, Secretary, in *
his Individual Capacity; *
Danny Holcomb, *
Member, in his *
Individual Capacity; *
Jim Johnson, Member, *
in his Individual *
Capacity; Maxine *
Nelson, Member, in Her *
Individual Capacity; *
John Treglown, in His *
Individual Capacity, *
*
Defendants, *
*
Henry Webb, in his *

individual and official *
capacities as Principal of *
Watson Chapel Junior High, *
*
Defendant/Appellant. *

Submitted: June 13, 2008
Filed: September 2, 2008

Before SMITH and GRUENDER, Circuit Judges, and ROSENBAUM,[1] District Judge.

SMITH, ,Circuit Judge

Christ Lowry, Colton Dougan, and Michael Joseph (collectively "plaintiffs"),[2] students in the Watson Chapel School District ("school district") during the events in question, brought this action under 42 U.S.C. § 1983, claiming that the school

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[1]The Honorable James M. Rosenbaum, United States District Judge for the District of Minnesota, sitting by designation.

[2]Plaintiffs brought this action through their legal representatives, Wendy Crow, Frank Dougan, Leigh Dougan, and Heidi Joseph.

district, the school district's superintendent, the principal of Watson Chapel Junior High, and the school district's school board members (collectively referred to as "defendants")[3] violated plaintiffs' rights under the First and Fourteenth Amendments. At the beginning of the trial, the district court[4] held that plaintiffs had established a violation of their constitutional rights and, accordingly, submitted only the issue of damages to the jury. The jury found that plaintiffs had proven neither compensatory nor punitive damages and awarded each plaintiff zero dollars–subsequently the district court granted plaintiffs' motion to amend the judgment to reflect an award of nominal damages. The district court also issued a permanent injunction and granted plaintiffs' motion for attorneys' fees and expenses. Defendants now appeal, arguing that the district court erred in: (1) holding that plaintiffs' First Amendment rights were violated; (2) granting plaintiffs' motion to amend the jury verdict to reflect nominal damages;

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[3]Superintendent Charles Daniel Knight was sued in his individual and official capacities. Watson Chapel Junior High principal Henry Webb was sued in his individual and official capacities. School board members Charles Daniel, Sandra C. Boon, Donnie Hartsfield, Danny Holcomb, Jim Johnson, Maxine Nelson, and John Treglown were sued in their individual capacities. Defendants who remained in the case following the district court's partial grant of summary judgment were the school district, Charles Daniel Knight, and Henry Webb.

[4]The Honorable J. Leon Holmes, Chief Judge, United States District Court for the Eastern District of Arkansas.

(3) making the preliminary injunction permanent in part; and (4) awarding plaintiffs attorneys' fees and costs. We affirm.

I. *Background*

In the summer of 2006, the school district implemented a mandatory school uniform policy ("the policy"), with specific provisions focused on grades seven through twelve. The school board intended the policy to "promote equal educational opportunity through economical access to appropriate school clothing and orderly, uniform apparel standards for students." The policy required students to "wear the school uniform while in school, on school buses, and at designated school bus stops." Paragraph 17 of the policy stated that "any attempt to defeat the uniformity intended by this policy is prohibited."

Several students and parents opposed the policy or the way it was enforced, and some of these parents and students organized a protest. On September 30, 2006, these parents and students handed out black armbands to be worn to school in protest of the policy on October 6, 2006. On that day, several junior and senior high school students wore the black armbands but did not wear them over any part of the school uniform. The school construed the student's conduct as an attempt to defeat the uniformity intended by the policy and disciplined the students who wore the armbands citing their violation of the uniform policy. On its face, the school uniform policy allows students to wear jewelry,

including wristbands,[5] "but the jewelry may not overlap any part of the uniform."[6] Plaintiffs each wore the armbands to school either on the wrist, forearm or biceps and none wore the armband over any part of the uniform. Each plaintiff was disciplined for wearing the armband.

Lowry also handed out a flyer critical of the school uniform policy without obtaining approval from the principal before doing so. The one-line 2006-2007 student literature review policy prohibited the "distribution of petitions or other printed matter not approved in advance by the principal." Lowry was also disciplined for violation of the student literature review policy.

On October 10, 2006, plaintiffs filed a complaint claiming that defendants violated the First and Fourteenth Amendments by punishing plaintiffs for wearing black armbands as a symbol of protest.

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[5]Dougan wore a white, stretchy rubber bracelet that said "Live Pure: 1 Timothy 4:12" every day, and he was never disciplined for wearing this adornment. Other students wore black rubber wristbands that said "Watson Chapel" that one witness testified were sold at a pep rally.

[6]The policy also stated that "No towel, scarf, bandana, do-rag, shirt, string, chain, jewelry, special button, insignia, label, marking, ,different-colored stitching, fringe, brad, stud, picture, logo, ribbon, embroidery, initials, monogram, special buckle, or any other form of adornment may be worn on or over any part of the uniform, except the school name, school logo, or school insignia.

The complaint requested declaratory relief, preliminary and permanent injunctive relief, damages, and attorneys' fees and costs. Plaintiffs simultaneously moved for a preliminary injunction to stop defendants from: (1) disciplining plaintiffs in any way for wearing the black armbands; (2) taking any further disciplinary action against plaintiffs on account of the black armbands; and (3) excluding plaintiffs from participation in school clubs or extracurricular activities. The motion also requested that defendants be ordered to expunge the discipline of plaintiffs related to wearing the black armbands from all student records. The district court granted the motion and ordered that defendants be preliminarily enjoined from disciplining any student who wore a band substantially similar to plaintiffs around the wrist.

On February 22, 2007, plaintiffs filed an amended complaint which included three new claims for relief in addition to the original claim, which was count one: (1) discipline of students for wearing armbands violated the First Amendment; (2) the student apparel policy violated the First Amendment; (3) defendants' enforcement of the student apparel policy violated plaintiffs' right to due process; (4) the student literature policy violated the First Amendment.

Subsequently, defendants filed a motion for partial summary judgment arguing that the school board members and administrators were entitled to

qualified immunity on all of the claims against them in their individual capacities. The motion was granted in part and denied in part. In its order and opinion addressing this motion, the district court found that the student uniform policy contravened no provision of the Constitution and that, in the alternative, a reasonable school board member would not have known that the policy was unconstitutional. As to the student literature review policy, the district court surmised that we, the Eighth Circuit, would likely hold the 2006-2007 student literature review policy unconstitutional, but the district court could not find that the law was so clearly established that school board members should have known that it was unconstitutional. Therefore, the school board members were entitled to qualified immunity on that issue. Because there was a genuine issue of material fact as to whether Knight and Webb imposed discipline to suppress a viewpoint, the court denied summary judgment on the issue of qualified immunity with respect to the claims against Knight and Webb in their individual capacities. The court found that there was evidence that the discipline was imposed to suppress a particular viewpoint and that, absent evidence that wearing the armbands or distributing the flyers would substantially interfere with he work of the school, the right of the students to engage in such conduct was established in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

As the trial began in September 11, 2007,

defendants stipulated that: (1) the discipline imposed on plaintiffs for wearing b lack armbands to school on October 6, 2006, was imposed because the black armbands signified disagreement with the student apparel policy; and (2) the wearing of the black armbands caused no material disruption or substantial interference with school. Based on these stipulations, the district court held that the facts necessary to establish a violation of plaintiffs' rights under the First and Fourteenth Amendment as outlined in *Tinker* were no longer in dispute, leaving damages as the only factual issue for the jury.[7] The district court instructed the jury, without objection, "If you find that the plaintiffs' damages have no monetary value, then you must return a verdict for the plaintiffs in the nominal amount of One Dollar ($1.00)."

On September 13, 2007, the jury found, in relevant part, that plaintiffs each had proven zero dollars in damages by a preponderance of the evidence. The next day, the court entered judgment in favor of Knight and Webb on plaintiffs' claims against them in their individual capacities for money damages. In the weeks following, plaintiffs timely filed a motion to alter or amend the judgment to reflect an award of one dollar in nominal damages.

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[7]At the close of plaintiffs' case, the district court entered judgment as a matter of law on count three against plaintiffs finding that the enforcement of the student apparel policy did not violate their right to due process.

The court granted the motion.

On October 31, 2007, the district court held that the previously entered preliminary injunction would be made permanent in part and dissolved in part. The court permanently enjoined the defendants from disciplining any student for wearing an band substantially similar to plaintiffs' armband around the wrist or any part of the arm not touching or covering any part of the school uniform. The court dissolved as moot that portion of the injunction enjoining defendants from using the events of October 6, 2006, in progressive discipline or to the detriment of plaintiffs. The district court also declined to enjoin the 2006-2007 student literature policy because that policy was no longer in effect.

Two weeks later, plaintiffs filed an application for fees and expenses seeking an award of attorneys' fees in the amount of $57,060.00 and an expenses award of $8,101.54. They titled this document "Plaintiffs' Application for Fees and Expenses" and attached several affidavits and exhibits to the document. This fee represented a $17,235.50 reduction from their total fee based on plaintiffs' attorneys' redacting time spent on non-prevailing issues. On December 20, 2007, the district court entered judgment for attorneys' fees and expenses in favor of Plaintiffs against the school district in the amount of n$45,601.54 plus post-judgment interest–$37,500 for attorneys' fees and $8,101.54 for out-of-pocket expenses.

II. *Discussion*

Defendants argue on appeal that the district court erred in: (1) holding that plaintiffs' First Amendment rights were violated; (2) granting plaintiffs' motion to amend the jury verdict to reflect nominal damages; (3) making the preliminary injunction permanent in part; and (4) awarding plaintiffs' attorneys' fees and costs.

A. *First Amendment Violation*

Defendants argue that the district court erred in holding that discipline of plaintiffs for wearing armbands that protested the school's dress code was unconstitutional.

> In reviewing a district court's judgment following a bench trial, we normally review the court's factual findings for clear error and its conclusions of law de novo. An appellate court's review, however, is unique in the context of a First Amendment claim. When such a claim is raised, we must make an independent examination of the whole record . . . to assure . . . that the judgment does not constitute a forbidden intrusion on the field of free expression.

Doe v. Pulaski County Special Sch. Dis., 306 F.3d 616, 621 (8th Cir. 2002) (internal citations and quotations omitted).

On the morning of trial, defendants stipulated that: (1) the discipline imposed on plaintiffs for wearing black armbands to school on October 6, 2006, was imposed because the black armbands signified disagreement with the student apparel policy; / and (2) the wearing of the black armbands caused no material disruption or substantial interference with school. In light of these stipulations, the district court held that the facts necessary to establish a violation of plaintiffs' rights under the First and Fourteenth Amendment, as interpreted in *Tinker*, were no longer in dispute. 393 U.S. 503 (1969). We agree.

In *Tinker*, the Supreme Court held that a school's regulation prohibiting students from wearing armbands to school and suspending students refusing to remove the armbands was an unconstitutional denial of the students' right to free expression. *Id.* at 514. The facts here nearly mirror *Tinker*. There, a group of adults and students in Des Moines, Iowa, held a meeting at a student's home to discuss publicizing their 9 objections to the Vietnam war and decided to wear black armbands on a specific date to show their support for a truce, *Id.* at 504. The principals of the schools heard about the planned protests and, before the date came, they passed a policy that any student wearing an armband to school would be asked to remove it and be suspended if he refused. *Id.* When the day came, some students wore the black armbands, and they were sent home and told they were suspended until they returned without their armbands, *Id.* The Supreme Court

reversed a decision of the district court and of this court upholding "the constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of school discipline." *Id.* at 504-05. The Supreme Court stated:

> The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment. First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. .. . The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and

> all of its creatures-Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes. On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. . . . The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to 'pure speech.'

Id. at 505-07 (internal citations and quotations omitted).

Defendants attempt to distinguish *Tinker* by emphasizing that the *Tinker* students protested the federal government's Vietnam war policy, whereas here the protest object was merely a school dress code. This distinction is immaterial. Whether student speech protests national foreign policy or local school board policy is not constitutionally significant. As the Supreme Court stated in *W. Va. State Bd. of Educ. v. Barnette:*

> Such Boards are numerous and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to account. The action of Congress in making flag observance voluntary and respecting the conscience of the objector in a matter so vital as raising the Army contrasts sharply with these local regulations in matters relatively trivial to the welfare of the nation. There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution.

319 U.S. 624, 637-38 (1943). Defendants also point out that the school in *Tinker* adopted its regulations for the specific purpose of stopping rumored protests, while here the student apparel policy was in place

before any mention of a protest occurred. However, the board's intent in creating and its timing of enforcement of the student uniform policy are irrelevant. The constitutionality of the uniform policy is not at issue-it has been deemed constitutional. We find defendants' attempts to meaningfully distinguish Tinker unconvincing. We hold that Tinker is so similar in all constitutionally relevant facts that its holding is dispositive. In both cases, a school district punished students based on their non-disruptive protest of a government policy. The district court was correct to find that, in light of defendants' fact stipulations, a violation of plaintiffs' First Amendment rights has been established.

Defendants also argue the district court was wrong to apply *Tinker* here because subsequent case law has narrowed *Tinker's* scope. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685-86 (1986) (holding that the school district's discipline of a student for delivering a sexually explicit though not legally obscene speech at a school assembly was constitutional and that the school was entitled to dissociate itself from the speech to demonstrate that vulgarity was inconsistent with the fundamental values of public school education); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272-73 (1988) (concluding "that the standard articulated in Tinker for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student

expression").

Recently, in *Morse v. Frederick*, the Supreme Court held that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use." U.S. 127 S. Ct. 2618, 2622 (2007). The Supreme Court held that the school officials "did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it. "*Id.* The Supreme Court also stated that it distilled two basic principles from *Fraser*:

> First, *Fraser's* holding demonstrates that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings. Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected. In school, however, Fraser's First Amendment rights were circumscribed in light of the special characteristics of the school environment. Second, *Fraser* established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the "substantial disruption" analysis prescribed by *Tinker*.

Id. at 2626-27 (internet citations and quotations omitted). Defendants accurately summarize these Supreme Court holdings described above. Yet, *Tinker* remains good law though modified for the circumstances described in *Fraser* nor *Morse* involved punishment of a non-disruptive student protest that violated no school policy based upon student viewpoint. We, therefore, apply *Tinker*.[8]

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[8]Defendants also argue that on the morning of trial the district court held the 2006-2007 student literature policy unconstitutional and in so doing, ruled on a moot issue because by that time defendants had instituted a new student literature policy. The student literature review policy issue was partially disposed of at the summary judgment stage. In the district court's ruling on defendants' partial motion for summary judgment, the district court surmised that we would find the student literature policy unconstitutional but granted summary judgment to the school board because the district court found that the right at issue was not clearly established. The record indicates that, tied to this issue of the student literature policy, there was no damage finding , no declaratory relief, no injunction, and no causation finding. We would decline to review this issue if it were clear that our only basis for review was the preliminary finding of the district court that we "probably" would have held the literature policy unconstitutional. *See Meuir v. Greene County Jail Employees*, 487 F.3d 1115, 1119 (8th Cir. 2007) ("Article III of the United States Constitution confines the jurisdiction of federal courts to justiciable cases and controversies."). However, the record is unclear whether plaintiffs sough attorneys' fees based on the student literature policy–during oral argument plaintiffs' counsel stated that no attorneys' fees were requested based on the student literature policy, but both the exhibits attached to the application for fees and the district court opinion addressing fees include discussion of the student literature review policy.

B. *Motion to Amend the Judgment*

Defendants also argue that the district court erred in granting plaintiffs' motion to amend the judgment regarding nominal damages.

> A district court has broad discretion in determining whether to grant or deny a motion to alter or amend judgment pursuant to Rule 59(e), and this court will not reverse absent a clear abuse of discretion. It should be noted that Rule 59(e) motions serve the limited function of correcting manifest errors of law or fact or to present newly discovered evidence.

Even assuming that the student literature review policy affected the attorneys' fee award, or at least was including in the request, mootness is not an issue because the voluntary change of the potentially unconstitutional policy did not moot the issue. *See Charleston Housing Authority v. United States Dept. Of Agriculture*, 419 F.3d 729, 740 (8th Cir. 2005) ("[I]n general, a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.") (internal quotations and citation omitted); *see also United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) ("Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave (t)he defendant . . . fee to return to his old ways. A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.") (internal quotations and citations omitted).

United States v. Metro. St. Louis Sewer Dist., 440 F.3d 930 (8th Cir. 2006) (internal citations and quotations omitted).

Defendants claim that plaintiffs waived any right to nominal damages after failing to raise the issue of inconsistent verdicts before the jury was released. According to defendants, the verdict is inconsistent because although the jury was instructed that it must award nominal damages, it returned a verdict awarding plaintiffs zero dollars. Defendants argue that the jury case to disregard the award of nominal damages because it felt that plaintiffs were not entitled to even nominal damages. A party waives an objection to an inconsistent verdict if an objection is not made before the jury is discharged. *See Dairy Farmers of Am., Inc. V. Travelers Ins. Co.*, 391 F.3d 936, 945 (8th Cir. 2004) (finding that "FDA waived its claim of inconsistent verdicts by failing to object to the inconsistency before judgment was entered"). However, we agree with the district court's finding that there is no inconsistent verdict here. To be inconsistent, a jury verdict must reach contradictory factual findings. See e. g., *Doe v. Washington County*, 150 F.3d 920, 923-24 (8th Cir. 1998) ("The jury found liability on the part of the county, but not on the part of the sheriff in his official capacity. The county correctly asserts that the jury's verdict is inconsistent in this respect. A suit against a county official in his official capacity is the equivalent of a suit against the county itself, The official is distinct only in his individual capacity").

The jury's failure to follow the court's instruction is not perforce an inconsistent verdict requiring that it be raised before the jury was released. There is no inconsistency between the jury finding of no damages and any other aspect of the jury verdict, Waiver is not an issue here.

As the district court found, pursuant to *Risdal v. Halford*, nominal damages must be awarded when a plaintiff establishes a violation of the right to free speech. 209 F.3d 1071, 1072 (8th Cir. 2000) (holding that an award of nominal damages is required "upon proof of an infringement of the first amendment right to speak"). The jury was required to award plaintiffs nominal damages, and therefore, the district court did not abuse its discretion in amending the judgment to reflect a nominal damage award as a matter of law.

C. *Permanent Injunction*

Defendants next argue that the district court erred in permanently enjoining them from disciplining any student who wears a band substantially similar to the ones plaintiffs wore around the wrist. We review the district court's issuance of a permanent injunction for abuse of discretion. *Kennedy Bldg. Assoc. v. CBS Corp.*, 476 F.3d 530, 53 3-34 (8th Cir. 2007).

> A court must consider the following factors in determining whether to issue

> a permanent injunction: (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties; (3) whether the movant proves actual success on the merits; and (4) the public interest. *See Guttau*, 190 F.3d at 847 (adapting the preliminary injunction factors announced in *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 113 (8th Cir.1981), to a review of a permanent injunction).

Forest Park II v. Hadley, 336 F.3d 724, 731 (8th Cir. 2003).

Defendants argue that there has been no evidence of irreparable harm to students other than plaintiffs, and so the injunction should have been denied. However, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). We hold that the district court properly weighed the factors noted above, including balancing the harms, and did not abuse its discretion in permanently enjoining defendants from disciplining any student for wearing a band substantially similar to those worn by plaintiffs in this case.

D. *Attorneys' Fees*

Finally, defendants argue that the district court erred in awarding plaintiffs attorneys' fees and costs. "We review de novo both the determination of whether a litigant is a prevailing party, and the legal issues related to the award of attorney fees." *Advantage Media, L.L.C. v. City of Hopkins*, 511 F.3d 833, 836 (8th Cir. 2008) (internal quotations and citations omitted). We review the actual award of attorneys' fees and costs for abuse of discretion. *Thompson v. Wal-Mart Stores, Inc.*, 472 F.3d 515, 516 (8th Cir. 2006). And, we review the district court's application of its local rules for abuse of discretion. *Northwest Bank and Trust Co. v. First Ill. Nat'l Bank*, 354 F.3d 721, 725 (8th Cir. 2003).

Pursuant to 42 U.S.C. § 1988(b) "[i]n any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . ."

Defendants first argue that the district court should have dismissed the applications for fees and costs because plaintiffs failed to file the proper pleadings with the district court. Defendants argue that plaintiffs violated Federal Rule of Civil Procedure 54(d)(2) and local rules by titling the document that they filed an "application" instead of a "motion." According to Federal Rule of Civil Procedure 54(d)(2)(A), "[a] claim for attorney's fees and related nontaxable expenses must be made by

motion unless the substantive law requires those fees to be proved at trial as an element of damages." Eastern District of Arkansas Local Rule 54.1(a) states "[i]n any case in which attorney's fees are recoverable under the law applicable to that case, a motion for attorney's fees shall be filed with the Clerk. .

Defendants also argue that plaintiffs' application should have been dismissed because it was filed as one document and Eastern District of Arkansas Local Rule 7.2(a) requires that "[a]ll motions except those mentioned in paragraph (d) shall be accompanied by a brief consisting of a concise statement of relevant facts and applicable law." Here, plaintiffs did not attach a brief to the application.

Defendants brought these errors to the district court's attention below, and plaintiffs requested that the district court look past the violations. The court ruled on the merits, granting attorneys' fees and expenses, without expressly addressing these two issues. Our case law indicates that we may assume that the district court implicitly ruled to allow the application to be treated as a motion and a brief. See *Sugarbaker v. SSM Health Care*, 187 F.3d 853, 855 (8th Cir, 1999) (assuming that the district court implicitly gave hospital leave to file its motion out of time when it addressed the merits of hospital's fee request). We conclude that it was not an abuse of discretion for the district court to excuse the minor pleading errors cited by defendants. Designating the

motion an application was a de minimis error-the only discrepancies from the federal and local rules was its title and its status as a single pleading rather than two separate documents. We believe the district court implicitly found that these errors were not enough to merit dismissal of the pleadings, or even enough to require amendment. We conclude that decision was not an abuse of discretion because the application contained all of the necessary information, was timely filed, and defendants have not claimed they were prejudiced. Rather, defendants emphasize alleged silver bullet technicalities that would dispatch plaintiffs' attorneys' fees. The district court acted within its discretion by rejecting defendants' argument that the pleading was insufficient.

Next, defendants argue that because plaintiffs only received nominal damages they should not receive attorneys' fees, or at most, a very small amount–in essence defendants argue that plaintiffs' victory was merely technical or de minimis.[9]

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[9]Although defendants do not directly argue on appeal that plaintiffs do not qualify as a prevailing party, as a preliminary matter, we affirm the district court's finding that plaintiffs qualify as a prevailing party for purposes of an attorneys' fee award. "At the outset we note that no fee award is permissible until the plaintiff has crossed the 'statutory threshold' of prevailing party status." *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 789 (1989) (holding that plaintiffs were prevailing parties because they obtained judgment vindicating their First Amendment rights as public

Defendants cite *Farrar v. Hobby* to support this

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employees and materially altered the school district's policy limiting the rights of teachers to communicate with each other concerning employee organizations and union activities.) The Supreme Court has stated:

> [T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement. Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. Otherwise the judgment or settlement cannot be said to affec[t] the behavior of the defendant toward the plaintiff. Only under these circumstances can civil rights litigation effect the material alteration of the legal relationship of the parties and thereby transform the plaintiff into a prevailing party. In short, a plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."

Farrar, 506 U.S. at 111-12.

Here, the district court held that plaintiffs were the prevailing party for purposes of an attorneys' fee award. And we agree because they succeeded in effecting the legal relationship between the parties by obtaining both preliminary and permanent injunctions and nominal damages. The question is, therefore, not if plaintiffs should have received an attorneys' fee award but how much that award should be.

argument. 506 U.S. 103, 114-15 (1992) ("Where recovery of private damages is the purpose of . . . civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought") (quoting *Riverside v. Rivera*, 477 U.S. 561, 585 (1986)). In Farrar, private damages were the purpose of the litigation, and of the $17 million requested in that case, the plaintiff received only nominal damages and no injunctive or declaratory relief. *Id.* at 107-08. Here, in contrast, the purpose of the litigation was not private damages. The Supreme Court has stated that:

> Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief. Rather, Congress made clear that it intended that the amount of fees awarded under [1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature.

Riverside, 477 U.S. at 575 (internal citations and quotations omitted). Although plaintiffs received only nominal damages, their victory was not merely technical. Plaintiffs obtained an injunction that benefitted all of the students in the school district, and the free speech right vindicated was not readily

reducible to a sum of money. We hold that the district court did not err in finding that plaintiffs' victory was more than merely technical.

Defendants also argue that because plaintiffs prevailed on only one of the four counts in their complaint, the district court should have awarded 25% of fees instead of 50%. The district court awarded $37,500 in attorneys' fees, which is approximately one-half of the total fees incurred. Defendants' contention that the district court was required to calculate the award based on a percentage of counts in the complaint on which plaintiffs' received damages lacks precedential support. Instead, our case law has rejected a similar, arithmetically simplistic fee-calculation argument. See *Wal-Mart Stores, Inc. v. Barton*, 223 F.3d 770, 772 (8th Cir. 2000) (rejecting the argument that because Barton only prevailed on one of her six original claims, her fee award of 70% was too high).

In fact, "[t]here is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment." *Hensley v. Eckerhart*, 461 U.S. 424, 436-37 (1983). The Supreme Court has established:

> [C]ertain principles to guide the discretion of the lower courts in setting

fee awards in cases where plaintiffs have not achieved complete success. Where the plaintiffs claims are based on different facts and legal theories, and the plaintiff has prevailed on only some of those claims, we indicated that [t]he congressional intent to limit [fee] awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim. In the more typical situation, where the plaintiffs claims arise out of a common core of facts, and involve related legal theories, the inquiry is more complex. In such a case, we indicated that the most critical factor is the degree of success obtained. We noted that in complex civil rights litigation, the plaintiff often may succeed in identifying some unlawful practices or conditions, but that the range of possible success is vast, and the achievement of prevailing party status alone may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved. We indicated that the district courts should exercise their equitable discretion in such cases to arrive at a reasonable fee award, either

> by attempting to identify specific hours that should be eliminated or by simply reducing the award to account for the limited success of the plaintiff.

Tex. State Teachers Ass'n, 489 U.S. at 789-90 (internal citations and quotations omitted).[10]

It is certainly true that the district court was required to take into account the amount of success plaintiffs had in determining a percentage of recovery. It did so. The district court considered

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[10]In *Hensley*, the Supreme Court stated that "[t]he amount of the fee, of course, must be determined on the facts of each case. On this issue the House Report simply refers to twelve factors. . . . " 461 U.S. at 429-30. Further, the Court noted the following as factors the district court should take into consideration:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Id. at 430 n.3.

plaintiffs' success on their claim that defendants violated their right to free speech and that plaintiffs received nominal damages and a preliminary and permanent injunction prohibiting defendants from disciplining any student wearing an armband similar to the band worn in this case. Plaintiffs also received a preliminary injunction preventing defendants from counting the protest against the plaintiffs in the school's progressive discipline system. The district court concluded that

> in view of the time expended, the results obtained, the skill necessary to perform the legal services properly, the customary fee for such services, and the experience, reputation, and ability of the attorneys, and after considering the record of this case as a whole, . . . [$37,500] represent[ed] a reasonable fee.

We hold that the district court was acting within its discretion in deciding such a fee award.[11]

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[11]Defendants argue that the school district admitted from the beginning of the litigation that plaintiffs were punished for protesting the student apparel policy and, therefore, plaintiffs' counsel should not be compensated for trial preparation. We find this argument unpersuasive and agree with the district court that the record shows instead that it first appeared that defendants may concede that they punished plaintiffs based on their viewpoint less than a week before trial. Therefore, the district court did not abuse its discretion in

III. *Conclusion*

For the foregoing reasons, we affirm the district court.

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awarding fees for trial preparation time.

We also reject defendants' argument that after plaintiffs were successful on the preliminary injunction hearings, the holdings of the district court were essentially the same, and therefore, time attorneys spent on the case after that point, the injunction would have been dissolved and the parties would not have been able to secure a permanent injunction or any fee award.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

CHRIS LOWRY, by, through, and with his Mother WENDY CROW; COLTON DOUGAN, by, through, and with his Father FRANK DOUGAN and Mother LEIGH DOUGAN; and MICHEAL JOSEPH, by, through, and with his Mother HEIDI JOSEPH — PLAINTIFFS

v. No. 5:06CV00262 JLH

WATSON CHAPEL SCHOOL DISTRICT, *et al.* — DEFENDANTS

OPINION AND ORDER

This is a civil rights case brought by students and parents of the Watson Chapel School District against the school district, the members of the school board, and two of the school administrators. The plaintiffs have sued the school board members and

the two administrators in both their individual and official capacities. The defendants have filed a motion for partial summary judgment in which they argue that the school board members and administrators are entitled to qualified immunity on all of the claims against them in their individual capacities. For the reasons stated hereinafter, the motion for partial summary judgment is granted in part and denied in part.

I.

In 1999 the Arkansas General Assembly adopted an act entitled *The School Uniform Initiative Act*, which amended § 6-18-102 of the Arkansas Code. The legislature made the following findings:

> The General Assembly hereby finds and determines that the clothes and footwear worn by students in the public schools often preoccupy and distract

> students from their major purpose for being in school, that of becoming educated in math, science, English, history, and other subjects. The General Assembly further finds that student competition over clothes and footwear has, in several instances, led to violence and injuries during school hours; whereas, in those Arkansas schools that have adopted school uniforms, disparities in student socioeconomic levels are less obvious and disruptive incidents are less likely to occur.

ARK. CODE ANN. § 6-18-102(a) (1999). The remainder of the act provided procedures by which a school district could adopt a school uniform policy.[1]

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[1] Some of the historical background to legislation of this sort is described in Amy Mitchell Wilson, *Public School Dress Codes: The Constitutional Debate*, 1998 B.Y.U. EDUC. & L.J. 147. In his 1996 State of the Union Address, then-President Clinton said, "I challenge all of our schools to teach character education, to teach good values and good citizenship. And if it means that teenagers will stop killing each other over designer jackets, then our public schools should be able to require their students to wear school uniforms." *See* President Bill Clinton, State of the Union Address (Jan. 23, 1996), *available at* http://clinton2.nara.gov/WH/New/other/sotu.html.

In the spring of 2006, the Watson Chapel School Board implemented a mandatory school uniform policy "to promote equal educational opportunity through economical access to appropriate school clothing and orderly, uniform apparel standards for students." The policy for the 2007-2008 school year is substantially the same but states that its purpose "is to promote a wholesome school climate, security, equal educational opportunity, and economical access to appropriate school clothing through orderly, uniform apparel standards for students." A copy of the policy for the 2006-2007 school year is attached to this opinion as Exhibit A. A copy of the policy for the 2007-2008 school year is attached to this opinion as Exhibit B.

A number of students and parents oppose the

policy, the way it is enforced, or both. Some of those students and parents organized a protest of the school uniform policy and its enforcement. On September 30, 2006, they handed out black armbands to be worn to school in protest of the policy on October 6, 2006. When October 6 came, several students wore black armbands to the junior and senior high schools. The armbands were not worn over any part of the school uniform. The students who wore the armbands were disciplined, allegedly for violating the school uniform policy. However, the school uniform policy allows students to wear jewelry, including wristbands, so long as the jewelry is not worn over any part of the school uniform.

One student, Chris Lowry, distributed a flyer criticizing the school uniform policy. Lowry did not

obtain approval of the principal before distributing the flyer, as required by a different policy of the Watson Chapel School District, and he was also disciplined for that violation of the school policy.

On October 10, 2006, the plaintiffs commenced this action by filing a one-count complaint in which the only claim for relief related to the discipline imposed for wearing black armbands on October 6, and they simultaneously moved for a preliminary injunction to stop all discipline relating to the black armbands. After an evidentiary hearing, the Court granted the motion and preliminarily enjoined the defendants from disciplining any student for wearing an armband substantially similar to the armband worn by the plaintiffs on October 6.

On February 22, 2007, the plaintiffs amended

their complaint. The amended complaint alleges four claims for relief: that the defendants violated the freedom of expression guaranteed by the First and Fourteenth Amendments when they disciplined students who wore black armbands to school on October 6; that the school uniform policy on its face violates the freedom of expression guaranteed by the First and Fourteenth Amendments in that it is a prior restraint on student speech; that the manner in which the school uniform policy is enforced violates the right of the students to due process; and that the student literature policy, which prohibits distribution of printed matter without prior approval by the principal, violates the freedom of expression guaranteed by the First and Fourteenth Amendments. The amended complaint seeks

declaratory relief, injunctive relief, nominal damages, punitive damages, and attorneys' fees.

The defendants have filed a motion for partial summary judgment in which they argue that they are qualifiedly immune from the claims against them in their individual capacities.

II.

Government officials performing discretionary functions are immune from suit for civil damages in a § 1983 action unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). In ruling on qualified immunity, the threshold question is whether, taken in the light most favorable to the party asserting the

defense, the facts alleged establish the violation of a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001). "This must be the initial inquiry." *Id.* If a constitutional violation could be made out, the next step is to ask whether the right was clearly established. This inquiry must be undertaken on a very specific level in light of the particular context of the case. *Id.* A right is "clearly established" when the "contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 202 (citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987)). Because qualified immunity is immunity from suit, not merely immunity from damages, the issue must be resolved

at the earliest stage possible. *Id.* at 200-01. Courts are required to address the merits of the constitutional issue first and may not "skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of this case." *Id.* at 201.

III.

A. THE CONSTITUTIONALITY OF THE SCHOOL UNIFORM POLICY

Neither the Supreme Court of the United States nor the Eighth Circuit has decided a case making a facial challenge to a school uniform policy or dress code on First Amendment grounds. However, the Sixth Circuit has addressed a similar though not identical school policy and upheld it against a First Amendment challenge in *Blau v. Fort*

Thomas Pub. Sch. Dist., 401 F.3d 381 (6th Cir. 2005), and the Fifth Circuit has done so in *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275 (5th Cir. 2001).

In *Blau*, the Sixth Circuit first held that the plaintiff had no claim to First Amendment protection because she had nothing particular that she wanted to communicate but only wanted to wear clothes that look nice on her and in which she feels good. *Blau*, 401 F.3d at 388-90. The testimony of the students here was similar. When Michael Joseph was asked what it was about the school uniform policy that he did not like, he said, "Just everybody has got to wear the same uniforms, we got to keep our shirts tucked in, we got to wear the IDs, and I just don't feel like keeping my shirt tucked in all day – it's

uncomfortable. I just don't like it." In response to the same question, Chris Lowry testified, "I just don't like having to go to school and look like everybody else. I like to be different from everybody else and express myself how I would like." Colton Dougan testified that he had no disagreement with the policy but did object to the way in which the policy was enforced. Thus, as to the facial challenge to the school uniform policy, the plaintiffs here have no more claim to First Amendment protection than did the plaintiff in *Blau*.

However, because the overbreadth doctrine sometimes permits a plaintiff to seek First Amendment protection on behalf of others, the court must address the larger issue of whether the school uniform policy violates the First Amendment. *Blau*,

401 F.3d at 390-91. Citing *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), the court in *Blau* said that a restriction on expressive conduct will be upheld if (1) it is unrelated to the suppression of expression, (2) it furthers an important or substantial government interest, and (3) it does not burden substantially more speech than necessary to further the interest. *Id.* at 391. The court upheld the dress code at issue, saying that it "does not regulate any particular viewpoint but merely regulates the types of clothes that students may wear"; "the dress code furthers important government interests", including "bridging socio-economic gaps between families within the school district, focusing attention on learning, increasing school unity and pride, enhancing school safety,

promoting good behavior, reducing discipline problems, improving test scores, improving children's self-respect and self-esteem, helping to eliminate stereotypes and producing a cost savings for families"; and because the dress code does not "suppress substantially more expressive conduct than is necessary to further its interests." *Id.* at 391-92; *see also Littlefield*, 268 F.3d at 286-87. These government interests are substantially the same as those invoked by the Arkansas General Assembly and the Watson Chapel School Board.

In *Blau*, the court stated, "In the First Amendment arena and other arenas as well, the Supreme Court has frequently emphasized that public schools have considerable latitude in fashioning rules that further their educational

mission and in developing a reasonable fit between the ends and means of their policies. *Blau*, 401 F.3d at 393 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 n.6, 108 S. Ct. 562, 571 n.6, 98 L. Ed. 2d 592 (1988)). In *Henerey ex rel. Henerey v. City of St. Charles*, 200 F.3d 1128 (8th Cir. 1999), and *Bystrom v. Fridley High Sch. Indep. Sch. Dist.*, 822 F.2d 747 (8th Cir. 1987), the Eighth Circuit made similar pronouncements regarding the manner in which federal courts should review First Amendment challenges to policies of a local school board. *See Henerey*, 200 F.3d at 1136 (education is primarily the responsibility of parents, teachers, and school officials, not federal judges); *Bystrom*, 822 F.2d at 755 (whether to adopt guidelines to restrict student speech is not a judicial question but one for school

boards and administrators). No dress code was at issue in either of those cases, nor did either of them cite *O'Brien*, but this Court nonetheless has concluded that the Eighth Circuit, in ruling on a claim that a school dress code on its face violates the freedom of speech guaranteed by the First and Fourteenth Amendments, likely would adopt an approach similar to *Blau* and *Littlefield*.

The plaintiffs cite as contrary authority *Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971), which addressed the constitutionality of a high school policy that required the hair of male students to be neatly trimmed around the ears and the back of the neck, to be no longer than the top of the collar on a regular dress or sport shirt, to leave the eyebrows visible, and

to cover no part of the ear.[2] A male student and his parents brought an action alleging that the regulation violated the student's First Amendment right to symbolic expression, his Fourteenth Amendment right to equal protection, his Ninth and Fourteenth Amendment rights to govern his personal appearance, and his parents' Ninth and Fourteenth Amendment rights to govern the raising of their family. With respect to the First Amendment claim, the court said:

> We deem the First Amendment contention to be without merit in the context of this case, since the record contains no evidence suggesting that Stephen's hairstyle represented a symbolic expression of any kind. The appellants concede that Stephen never considered his hairstyle to be symbolic of any idea. They argue, however, that

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[2] The Watson Chapel School District policy at issue here does not regulate hair length.

> a "[nonconforming hairstyle] need not symbolize anything at all . . . to be a constitutionally protected expression." We cannot accept this unusually broad reading of the First Amendment. Since all conduct cannot be labeled speech even when "the [actor] intends thereby to express an idea," [citing *O'Brien*], certainly conduct not intended to express an idea cannot be afforded protection as speech.

Bishop, 450 F.2d at 1074. Insofar as *Bishop* is on point, it is against the plaintiffs because it held that the hairstyle regulation did not violate any First Amendment right.

Although *Bishop* held that the student's choice of hairstyle was not protected by the First Amendment, it held, following *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), that rights other than those enumerated in the Constitution are protected by the

Constitution and that those unenumerated rights include "the freedom to govern one's personal appearance." *Bishop*, 450 F.2d at 1075. Here, the plaintiffs have added that the school uniform policy violates the First and Fourteenth Amendments to the Constitution because it "is a prior restraint on pure student speech, bans all pure student speech, is a content-based restriction on speech, and coerces speech[.]" Amended Complaint, p. 19. The Court does not understand the amended complaint to allege or the plaintiffs' brief to argue that the school uniform policy violates an unenumerated right; instead, plaintiffs invoke the First Amendment as applied to the states through the Fourteenth Amendment.

Although the plaintiffs have not argued that

Watson Chapel's school uniform policy violates some unenumerated right, the Court notes that regulating a student's haircut is different from requiring a school uniform. The Watson Chapel school uniform must be worn at school approximately seven hours per day, five days per week, for approximately nine months of the year. During the remaining seventeen hours of the day, on weekends, during holidays, and during summers – whenever the student is away from school – the student is absolutely free of the school uniform policy. The school uniform policy has no impact on what students may wear other than at school during school hours. On the other hand, a hairstyle regulation such as the one at issue in *Bishop* would have an impact on a student beyond school hours and outside of school property. At night,

or on weekends, and during holidays, a student's hairstyle would still be affected by the school policy; and it would be affected to some extent even during the summers because of the length of time it takes hair to grow. In *Bystrom*, the court noted that the regulation by school authorities of student conduct on school property raises quite different issues than a claim by school authorities to regulate student conduct off campus. *Bystrom*, 822 F.2d at 750. So, this Court is not convinced that the Eighth Circuit would extend *Bishop* to the facts of this case.

Plaintiffs attempt to distinguish *Blau* on the ground that the regulation in *Blau* did not prohibit all symbols and logos but, instead, limited the size of non-school logos, whereas, the Watson Chapel policy prohibits all logos other than school logos. Plaintiffs

conclude from this that the regulation in *Blau* was content neutral whereas the Watson Chapel policy is not. Another district court has said that a school uniform policy is content neutral even if it prohibits logos other than that of the school. *Long v. Bd. of Educ. of Jefferson County, Ky.*, 121 F. Supp. 2d 621, 625 n.5 (W.D. Ky. 2000), *aff'd* 21 Fed. Appx. 252 (6th Cir. 2001). Plaintiffs have cited no authority to the contrary. In *Long*, the court stated, "the court finds nothing in the evidence of this case from which a reasonable jury might infer that Defendant's real intent was to suppress Plaintiffs' opinions." *Id.* Likewise, no evidence has been presented in this case that the real intent in adopting the school uniform policy was to suppress opinion. To put it another way, no evidence has been presented that the stated

purposes of the School Uniform Initiative Act or the Watson Chapel School uniform policy were pretextual.

The Watson Chapel school uniform policy does not regulate any particular viewpoint but merely regulates the types of clothes that students may wear; it is intended to further important government interests, including bridging socioeconomic gaps between families in the school district, focusing attention on learning rather than on fashion, and improving school security; and it does not suppress substantially more expressive conduct than necessary to further these interests.

The restrictions in the school uniform policy apply only during school hours; students remain free to wear what they want outside of school. Even

during school hours, the school uniform policy does not foreclose all means of individual expression. One provision of the school uniform policy states that students may wear jewelry that does not overlap any part of the uniform. That provision has been construed to allow bracelets and wristbands, including bracelets and wristbands with messages written on them. At the preliminary injunction hearing, part of the plaintiffs' proof that the black armbands were suppressed because of the viewpoint that they expressed was that students have been allowed to express other viewpoints on substantially similar wristbands. Chris Lowry testified that he wears a blue armband to school, that the purpose of the blue armband is to send the message that freedom cannot protect itself, and that he has not

been disciplined for wearing it. Likewise, Colton Dougan wears a bracelet that says, "Live Pure: I Timothy 4:12," and he has not been disciplined. Necklaces that do not overlap the school uniform are permitted, and they also could be used to express ideas in the same way that Lowry uses his blue armband and Dougan his bracelet. In addition, according to the undisputed testimony of the superintendent, Charles Daniel Knight, in his deposition, the school district sponsors a student newspaper that is open to guest editorials by students. And since the constitutional issue right at stake is freedom of speech, it should be noted that nothing in the school uniform policy prohibits students from speaking to one another, to teachers, and to administrators, before and after classes, in the

hallways, during classroom discussions, during extracurricular activities, and the like. The student handbook prohibits lying, cheating, verbal abuse, name-calling, racially derogatory remarks, and sexual harassment, but the plaintiffs do not complain about any of those regulations, and the student handbook does not otherwise prohibit students from saying what they think. Thus, "[t]he uniform requirement does not bar the important 'personal inter-communication among students' necessary to an effective educational process." *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 443 (5th Cir. 2001) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512, 89 S. Ct. 733, 21 L. Ed. 2d 73 (1969)).

This Court believes that the Eighth Circuit,

when reviewing a First Amendment challenge to a school uniform policy, would use an analysis much like that used in *Blau* and *Littlefield*. The Watson Chapel school uniform policy would survive scrutiny under *Blau* and *Littlefield*.

In addition to arguing that the school uniform policy violates the First Amendment, the plaintiffs argue that it is void for vagueness. However, the policy actually is quite clear and specific. It gives reasonable notice of what is prohibited and therefore is not void for vagueness. *Brandt v. Bd. of Ed. of City of Chicago*, 420 F. Supp. 2d 921, 939 (N.D. Ill. 2006). In stating why they believe that the policy is vague, the plaintiffs point to the manner in which it has been enforced, but that is a separate issue.

In the opinion of this Court, the school uniform

policy adopted by the Watson Chapel School District contravenes no provision of the United States Constitution. In the alternative, if the school uniform policy is unconstitutional, the law so stating was not clearly established when the school board members adopted it. This Court cannot say that a reasonable school board member would have known that the school uniform policy is unconstitutional.

B. THE STUDENT LITERATURE REVIEW POLICY

The student literature review policy in effect during the 2006-2007 school year is a bit different. It is a one-line policy stating that "distribution of petitions or other printed matter not approved in advance by the principal" is prohibited. Although neither party has cited a case directly on point, nor has the Court found one, the two Eighth Circuit cases

addressing school regulations that required prior approval of literature to be distributed on school property suggest that some guidance must be given to the administrator who is to conduct the review and some limit must be placed on the time within which he has to act. In *Henerey*, the court considered and upheld a school regulation that required prior approval of certain materials but specifically noted that the guidance given to the administrator who was to conduct the review was sufficiently specific and provided that administrator had "a reasonable time period – twenty-four hours – to evaluate materials." *Henerey*, 200 F.3d at 1135. Likewise, in *Bystrom*, the court reviewed regulations governing literature to be distributed on a school campus, found all but one of the regulations constitutional, and overruled an

objection that the regulations failed to specify a time within which the superintendent must respond on appeal by construing the rules to require the superintendent to make a decision within three days. *Bystrom*, 822 F.2d at 754-55. Neither of these cases is directly on point because neither addressed a rule like the one here, which gives no guidance to the principal as to what printed matter should be approved for distribution and provides no time limit within which the principal must act. However, it is logical to infer from *Henerey* and *Bystrom* that the Eighth Circuit probably would require some guidelines that the administration must follow in determining whether to approve of printed matter that is to be distributed on campus and some time limit within which the administration must act.

That is not to say, however, that when the Watson Chapel School Board adopted the student literature review policy in effect for the 2006-2007 school year the school board members violated clearly established law. Neither *Henerey*, *Bystrom*, nor any other case cited by the plaintiffs expressly holds that a policy requiring prior approval of literature to be distributed on school grounds must provide guidance to the administrator who grants or withholds the approval and a time limit within which he must act. But even if the specific action in question has not previously been held unlawful, qualified immunity may still be denied if in the light of preexisting law the unlawfulness is apparent. *Anderson*, 483 U.S. at 640, 107 S. Ct. at 3039.

In 1988 the Supreme Court rejected the

proposition that school officials could exercise prepublication restraint with respect to school-approved publications only pursuant to specific written regulations and then stated, "We need not now decide whether such regulations are required before school officials may censor publications not sponsored by the school that students seek to distribute on school grounds." *Kuhlmeier*, 484 U.S. at 273 n.6, 108 S. Ct. at 571 n.6. Thus, in *Kuhlmeier* the Supreme Court expressly left undecided the issue presented here and has not addressed that issue since. If the law on this issue were so clear that school board members should know of it, why would the Supreme Court make such a point of withholding a decision? If it were clearly established law that, in the absence of specific regulations or guidelines,

school officials may not censor publications that students wish to distribute on campus when those publications are not school-sponsored, the court could have so noted in explaining the decision in *Kuhlmeier*, or the court could have been silent on the issue precisely because it was clearly established and therefore needed no comment; but for the court to call attention to the fact that it was withholding a decision on that issue suggests that the court did not regard the law on that issue as clearly established. The court expressly stated that regulations are not required before a school may restrain school-sponsored publications and expressly left open the question of whether regulations are required before a school may restrain publications that it does not sponsor. It is clearly established that "the prior

restraint of speech within secondary schools is not per se unconstitutional." *Henerey*, 200 F.3d at 1134; *see also Bystrom*, 822 F.2d at 750. It is not so clear, however, when prior restraints are constitutional and when they are not.

While surmising that the Eighth Circuit likely would hold that Watson Chapel's student literature review policy is unconstitutional, this Court cannot find that the law was so clearly established that school board members should have known that it was unconstitutional. The school board members are entitled to qualified immunity on this issue.

C. THE CONSTITUTIONALITY OF THE DISCIPLINE IMPOSED BY KNIGHT AND WEBB

The other two defendants are Charles Daniel Knight and Henry Webb. Knight was the

superintendent of students and Webb the principal of the junior high school at the time of the events in question. The plaintiffs allege that Knight and Webb enforced the policies in an unconstitutional manner. The plaintiffs raise a variety of concerns, the most serious of which is that Knight and Webb used the school uniform policy as a pretext to punish students who wore the black armbands as a means of expressing disagreement with school policy. The Court previously heard evidence that some students wore a black armband to school as a means of protest against the school uniform policy and that they were disciplined for doing so. Although the defendants contend that the students were disciplined because the armbands violated the school uniform policy, there is evidence to the contrary. Knight and Webb

have permitted students to wear bracelets and wristbands hardly distinguishable from the black armbands at issue. When asked at the preliminary injunction hearing why students were not allowed to wear the black armbands on October 6 but were allowed to wear the other bracelets and wristbands, Webb testified, "[t]his was a direct protest against the school dress policy." Likewise, Webb testified in his deposition that he could not recall that any student has been disciplined for violating the student literature review policy other than Chris Lowry, who was disciplined for distributing the protest flyer on October 6, 2006.

Viewing the evidence in the light most favorable to the plaintiffs, a reasonable person could find that the black armbands did not violate the

school uniform policy, which permitted wristbands and jewelry; that the students who wore the black armbands were disciplined because the armbands were used to express disagreement with school policy; and that Lowry was additionally disciplined because the flyer expressed disagreement with school policy. In other words, there is evidence that discipline was imposed to suppress a particular viewpoint. Absent evidence that wearing the armbands or distributing the flyers would substantially interfere with the work of the school, the right of students to engage in such conduct was clearly established in 1969.[3] *Tinker*, 393 U.S. at 514, 89 S. Ct. at 740; *see also Bystrom*, 822

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[3] While "the mode of analysis set forth in *Tinker* is not absolute," *Morse v. Frederick*, 127 S. Ct. 2618, 2627 (2007), *Tinker* has not been reversed and therefore still controls on the present issue, because the facts, viewed in the light most favorable to the plaintiffs, cannot be distinguished from those in *Tinker* in any legally significant way.

F.2d at 755. Because there is a genuine issue of material fact as to whether Knight and Webb imposed discipline to suppress a particular viewpoint, as distinct from simply enforcing policy without regard to viewpoint, the Court cannot grant summary judgment on the issue of qualified immunity with respect to the claims against them in their individual capacities.

As to the board members, no evidence has been presented that any member of the school board participated in the disciplinary decisions at issue, nor have the plaintiffs specifically alleged or specifically argued that any board members participated in these disciplinary decisions. Board member Danny Holcomb testified, "All I do is set the policy, I don't enforce it." In the absence of any specific allegation,

argument, or evidence that the board members were involved in disciplinary decisions, the Court has construed plaintiffs' claims about the manner of enforcement not to be directed at the board members in their individual capacities.

CONCLUSION

The claims against Charles Daniels, Sandra C. Boone, Donnie Hartsfield, Danny Holcomb, Jim Johnson, Maxine Nelson, and John Treglown in their individual capacities are hereby dismissed because those defendants are qualifiedly immune from the action brought by these plaintiffs for money damages. Charles Daniel Knight and Henry Webb are not, however, entitled to qualified immunity for the claims against them in their individual capacities.

The defendants' motion for partial summary

judgment is granted in part and denied in part. Document #37. The claims against Charles Daniels, Sandra C. Boone, Donnie Hartsfield, Danny Holcomb, Jim Johnson, Maxine Nelson, and John Treglown in their individual capacities are hereby dismissed. The motion is denied as to Charles Daniel Knight and Henry Webb.

IT IS SO ORDERED this 22nd day of August, 2007.

/s/ J. Leon Holmes
J. LEON HOLMES
UNITED STATES
DISTRICT JUDGE

STUDENT APPAREL

1. Students are required to wear the school uniform while in school, on school buses, and at designated school bus stops, unless directed otherwise by the school principal.
2. The intent of this rule is to promote equal educational opportunity through economical access to appropriate school clothing and orderly, uniform apparel standards for students.
3. Principals shall strictly enforce this policy with progressive disciplinary consequences.
4. Principals shall not allow individual exceptions—even for short periods of time—on any basis other than minimal variance to accommodate a documented handicapping condition.
5. Principals may permit group exceptions only for special school activities—such as JROTC uniform day or an occasional special apparel theme day.
   A. Any theme day special apparel must be freely available to all students.
   B. No school day shall be declared simply uniform-free.
6. Students are not required to wear the school uniform to after-school sporting events or similar activities outside the school day.
7. The uniform rules shall be strictly enforced by principals and teachers at all times and in all school settings, allowing no student to enter class out of uniform. Schools shall maintain a

supply of uniforms for emergencies and new students.

8. Failure to wear the school uniform is a violation of the student discipline policy with all of the possible disciplinary consequences listed in the student handbook.
9. School uniform means
   A. in grades 7-12, polo style shirt with placket, 2 or 3 buttons, long or short sleeves, and ribbed-knit collar in the color hunter green only for the junior high and white only for the senior high school
   B. in grades K-6, polo style shirt with long or short sleeves, placket, 2 or 3 buttons, and ribbed-knit collar, or oxford style shirt with collar and long or short sleeves, in white, light blue, or burgundy
   C. pants, shorts, jumper, skirt, capris, or skorts with plain or pleated front
      a. pants, capris, and shorts must be straight-legged, with or without cuffs
      b. pants, capris, and shorts must have belt loops in grades 7-12
      c. colors for elementary—khaki or navy blue
      d. color for junior and senior high—khaki only
      e. no cargo pants, stretch pants, sweatpants, wind pants, or

denim of any color

D. solid color black or brown belt with pants, capris, or shorts in grades 7-12

E. solid color black or brown belt with any garment that has belt loops

F. student identification card issued by the school office
   a. worn where clearly visible at all times
   b. either pinned to the uniform or on a lanyard
   c. required as soon as issued by the office
   d. in all schools except Edgewood (Grades K-1).

G. If an outer garment is needed for warmth, the uniform may include a solid color sweatshirt or sweater in black, golden yellow, or the shirt color designated for the school attended
   a. with or without school insignia, such as the school name and mascot, but with no other words, names, logos, or markings
   b. with or without an attached hood.

H. If an undershirt is needed for warmth, the uniform may include a plain white tee shirt or plain white turtle-neck with no markings or logos
   a. The tee or turtle-neck may be visible at the neck above the

placket of the polo shirt.

b. The tee or turtle-neck may not be visible below the sleeve of the polo shirt.

10. The school uniform shall be kept in good repair with
    A. no frayed hems or seams
    B. no splits other than manufactured splits
    C. no missing buttons, belt loops, or other parts.
11. The school uniform must fit with
    A. no sagging
    B. no skin-tightness
    C. no plunging neckline
    D. no transparency
    E. full body coverage from the shirt placket to a dollar bill's width above the knee
    F. shirt-tails long enough to remain tucked in during all physical activity.
12. The school uniform must be worn with waistbands fastened, shirttails tucked in, and belts buckled.
13. No hat or other head covering is permitted, except that hoods attached to an approved outer garment may be pulled up on the head outside for warmth; hoods may not be worn pulled up on the head inside buildings.
14. No towel, scarf, bandana, do-rag, shirt, string, chain, jewelry, special button, insignia, label, marking, different-colored stitching, fringe, brad, stud, picture, logo, ribbon, embroidery, initials, monogram, special buckle, or any

other form of adornment may be worn on or over any part of the uniform, except the school name, school logo, or school insignia.

15. Personal jewelry may be worn attached to or hanging on the body, but jewelry may not overlap any part of the uniform. Sunglasses may be worn as eye protection outside, but sunglasses may not be visible inside the buildings.

16. Coats and jackets may be worn over the uniform, but
    A. they must be unzipped or unbuttoned inside the buildings so that the uniform is fully visible in the front.
    B. No pullover coats or jackets which do not open fully in the front may be worn over the uniform in the buildings.

17. Any attempt to defeat the uniformity intended by this policy is prohibited.

Arkansas Code Annotated 6-18-102

6-18-102. Legislative findings.

a. The General Assembly hereby finds and determines that the clothes and footwear worn by students in the public schools often preoccupy and distract students from their major purpose for being in school, that of becoming educed in math, science, English, history, and other subjects. The General Assembly further finds that student competition over clothes and footwear has, in several instances, led to violence and injuries during school hours; whereas, in those Arkansas schools that have adopted school uniforms, disparities in student socioeconomic levels are less obvious and disruptive incidents are less likely to occur.

No. 08-716

Supreme Court, U.S.
FILED
JAN 29 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

WATSON CHAPEL SCHOOL DISTRICT, *et al.*,

Petitioners,

—v.—

CHRIS LOWRY, BY, THROUGH AND WITH HIS MOTHER WENDY CROW; COLTON DOUGAN, BY, THROUGH, AND WITH HIS FATHER FRANK DOUGAN AND MOTHER LEIGH DOUGAN; AND MICHEAL JOSEPH, BY, THROUGH, AND WITH HIS MOTHER HEIDI JOSEPH,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Eighth Circuit properly apply *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), to a case involving punishment of public secondary school students for peacefully protesting school policy by wearing black armbands that did not violate the school dress code and did not cause any disruption?

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INTRODUCTION

Petitioners present this case as a challenge to the constitutionality of a school dress code. It is not. On the morning of trial, Petitioners stipulated that Respondents were disciplined for wearing black armbands to school "because the black armbands signified disagreement with the student apparel policy." Pet.App. at 8a-9a, 12a; BIO App. at 1a. Petitioners also stipulated that "the wearing of black armbands caused no material disruption or substantial interference with the school." Pet. App. at 9a, 12a; BIO App. at 1a. The District Court found that the black armbands worn by Respondents did not violate the school dress code, Pet.App. at 36b-37b, and the Eighth Circuit affirmed that factual finding. *Id.* at 5a-6a, 12a.

Given these findings and concessions, the only issue properly raised by the petition for certiorari is whether students can be disciplined for wearing black armbands that do not violate the school dress code and are not disruptive, simply because school officials disagree with the message they convey. Both lower courts found that Petitioners had violated the First Amendment on these facts. Those decisions represent nothing more than the straightforward application of principles this Court first announced forty years ago when it held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503, 506 (1969). In the decades since, this Court has never questioned *Tinker*'s core holding. The judgment

below is manifestly correct and does not merit plenary review by this Court.

COUNTER-STATEMENT OF THE CASE

On October 6, 2006, Respondents and other students wore black armbands to school to protest a mandatory school uniform policy that the Watson Chapel School Board had adopted the previous spring. The policy, which was controversial, did not prohibit students from wearing armbands so long as the armbands did not cover their school uniforms. Indeed, after the policy was adopted, armbands that bore the Watson Chapel School District logo were sold at a school event, and worn at school, as were others, including one that bore the Christian Message, "Live Pure: 1 Timothy 4:12. Students who wore those armbands were not punished. Pet. App. at 6a & n.5, 23b-25b. By contrast, Respondents were disciplined for wearing their black armbands to school, allegedly for violation of the school dress code.

When asked to explain at a preliminary injunction hearing why Respondents were disciplined for wearing armbands when other students were not, a school official testified that Respondents' armbands were "a direct protest against the dress code policy." Pet.App. at 35b-36b. That concession was reinforced by two stipulations that Petitioners made on the morning of trial. As noted above, Petitioners stipulated that Respondents were disciplined "because the black armbands signified disagreement with the student apparel policy." *Id.* at 8a, 12a. In addition, Petitioners stipulated that "the wearing of

the black armbands caused no material disruption or substantial interference with school." *Id.* at 9a, 12a.

Based on these stipulations, the District Court concluded that the material facts were no longer in dispute and that Petitioners had violated Respondents' First Amendment rights under the standard set forth in *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503. The District Court enjoined Petitioners from "disciplining any student from wearing a band substantially similar [to the armband worn by Respondents] around the wrist or any part of the arm not touching or covering any part of the student's school uniform." BIO. App. at 2a. Respondents were also awarded nominal damages for the violation of their First Amendment rights. *Id.*[1]

The Eighth Circuit affirmed. Pet.App. at 32a. In particular, the Eighth Circuit noted the following: First, Respondents' armbands did not violate the school dress policy because they did not "overlap any part of the uniform." *Id.* at 5a-6a & n.6. Thus, unlike a challenge to the school dress code itself, this case "does not relate to the regulation of the length of skirts or the type of clothing" worn by students at school. *Id.* at 14a. Second, Respondents' armbands were not disruptive. *Id.* at 16a. Third, Respondents

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[1] Respondents' complaint also included a challenge to the school apparel policy but, despite Petitioners' claim to the contrary, that issue is not before the Court. The District Court granted Petitioners' summary judgment motion on the constitutionality of the student apparel policy, Pet.App. at 27b-28b, and Respondents did not appeal that ruling to the Eighth Circuit. Pet.App. at 8a, 16a.

were disciplined because their armbands "signified disagreement with the student apparel policy." *Id.* at 12a. In short, the Eighth Circuit held, "*Tinker* is so similar in all constitutionally relevant facts that its holding is dispositive." *Id.* at 16a.

REASONS FOR DENYING THE PETITION

THIS CASE PRESENTS A STRAIGHFORWARD APPLICATION OF *TINKER*, DOES NOT CREATE ANY CONFLICT AMONG THE CIRCUITS, AND DOES NOT RAISE ANY UNRESOLVED QUESTIONS OF NATIONAL IMPORTANCE.

In *Tinker*, school officials sought to punish students who had worn black armbands to school in a non-disruptive, passive expression of protest against the Vietnam War. This Court held that school officials could not ban students from wearing black armbands merely because school officials had an "urgent wish to avoid the controversy which might result from the expression," 393 U.S. at 510. As the *Tinker* Court explained, the "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression," and restrictions on protected speech cannot be justified unless there is a "showing that the students' activities would materially and substantially disrupt the work and discipline of the school." *Id.* at 508, 510-511.

This Court has never deviated from that holding. To the contrary, even in cases where the

Court has upheld the actions of school officials against First Amendment challenge, it has reaffirmed the bedrock principle that "students cannot be punished merely for expressing their personal views on the school premises . . . unless school authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students.'" *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)(quoting *Tinker*, 393 U.S. at 512-13.); *Morse v. Frederick*, 551 U.S. ___, 127 S.Ct. 2618, 2636 (2007)(Kennedy & Alito, JJ., concurring)(noting that "the opinion of the Court reaffirms the central holding of *Tinker*); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)(noting that students have "the classroom right to wear Tinker's armband, but not Cohen's jacket.")

Federal and state courts throughout the country have understood and applied this core holding of *Tinker* for four decades. *See, e.g., Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1279 (11th Cir. 2004)(ruling that student could not be punished under *Tinker* for silently holding his fist in the air during the Pledge of Allegiance); *Newsom ex rel. Newsom v. Albemarle County School Bd.*, 354 F.3d 249, 257 (4th Cir. Va.,2003)(applying *Tinker*'s "material and substantial disruption" standard to preliminarily enjoin school's ban on all images or messages related to weapons); *Shanley v. Northeast Independent School District*, 462 F.2d 960, 970 (5th Cir. 1972)(holding that students may not be

disciplined under *Tinker* for the non-disruptive, off-campus distribution of underground newspaper).

Thus, at least since *Tinker* was decided in 1969, it has been black letter law that the First Amendment protects students against school discipline based on speech that is not disruptive and does not interfere with the work of the school. The judgment below represents nothing more than the routine application of this well-settled principle.

Petitioners attempt to manufacture a split of authority by noting that circuits differ in their approach to the constitutionality of content-neutral school uniform policies. Pet. at 6-7. The constitutionality of content-neutral school uniform policies, however, is not before the Court. *See* n.1, *supra*. Petitioners have admitted, and both the District Court and Eighth Circuit found, that Respondents did not violate the school dress code by wearing black armbands to school as a non-disruptive protest against the school apparel policy. Instead, Respondents were disciplined simply and solely because of the protest message they sought to convey. Both lower courts found that Petitioners' actions under these circumstances violated the First Amendment. There is no circuit conflict on that fundamental issue, and Petitioners have not identified one.

Petitioners' contention that the legal standards governing this case have been called into question by *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, and *Morse v. Frederick*, 551 U.S. ___, 127 S.Ct. 2618 (2007), is similarly misguided.

Hazelwood upheld the authority of school officials to control the contents of the official school newspaper, which the Court characterized as a form of school-sponsored speech because it was part of the curriculum, supervised by the faculty, and "published" by the school under its own banner. Respondents black armbands have none of those indicia of school sponsorship or control. *Fraser* involved vulgar speech at an official school assembly. This case involves neither. *Morse* concerned the ability of a school to prohibit what it viewed as the promotion of illegal drug use by students at an official school function. Respondents' non-disruptive speech obviously had nothing to do with drug use or any other illegal activity. Most fundamentally, each of the Court's post-*Tinker* cases carefully distinguished its facts from *Tinker*'s. In this case, by contrast, the Eighth Circuit aptly noted that "the facts here nearly mirror *Tinker*." Pet.App. at 12a.

Finally, this case does not call into question the deference owed to school officials when they are exercising their responsibilities in a manner that is consistent with the Constitution. It has been clear since *Tinker* that students cannot be "confined to the expression of those sentiments that are officially approved." 393 U.S. at 511. It is equally clear that Petitioners' actions in this case violated *Tinker*. Deference to school officials does not place their actions "beyond the reach of the Constitution." *West Virginia Board of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). This Court has never ruled otherwise.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully Submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

CHRIS LOWRY, by, through, and with his Mother WENDY CROW;
COLTON DOUGAN, by, through, and with his Father FRANK DOUGAN and Mother LEIGH DOUGAN; and
MICHAEL JOSEPH, by, through, and with His Mother HEIDI JOSEPH — PLAINTIFFS

v. No. 5:06CV00262 JLH

WATSON CHAPEL SCHOOL DISTRICT, *et al.* — DEFENDANTS

FINAL DECREE

At the trial beginning on September 11, 2007, the defendants stipulated that the discipline imposed on Chris Lowry, Colton Dougan, and Michael Joseph for wearing black armbands to school on October 6, 2006, was imposed because the black armbands signified disagreement with the student apparel policy and that the wearing of the black armbands caused no material disruption or substantial interference with school. In light of these stipulations, the Court held that facts necessary to establish a violation of the plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution as interpreted in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969), were no longer in dispute. The Court entered judgment on the jury

verdict and granted plaintiffs' motion to amend the judgment to include an award of nominal damages. The issues now before the Court are those relating to what equitable relief, if any, should be granted.

The preliminary injunction entered in this action on October 20, 2006, in part will be made permanent and in part will be dissolved. The defendants are hereby permanently enjoined from disciplining any student for wearing a band substantially similar to plaintiffs' Exhibit 13 presented at the October 19, 2006, hearing in this matter around the wrist or any part of the arm not touching or covering any part of the student's school uniform.

The portion of the preliminary injunction that enjoined the defendants from using the events of October 6, 2006, in the progressive discipline of Chris Lowry, Colton Dougan, or Michael Joseph, or otherwise using the events of October 6 to the detriment of those three students is now moot and is therefore dissolved. Chris Lowry is no longer a student in the Watson Chapel School District. Colton Dougan and Michael Joseph are students in the Watson Chapel School District, but no evidence has been introduced that there is any likelihood that an event from the school year 2006-2007 would affect the progressive discipline on a student in subsequent school years.

Count IV of the amended complaint challenged the constitutionality of the student literature policy in effect in the 2006-2007 school year. The Court held that that policy was

unconstitutional. A different policy was adopted for the 2007-2008 school year. Plaintiffs did not amend their pleadings to challenge the constitutionality of the student literature policy currently in effect. Because the student literature policy in effect in 2006-2007 is no longer in effect, there is no threat that that policy will be enforced so as to cause harm to either of the two plaintiffs who are still enrolled in the Watson Chapel School District. Therefore, no injunction will issue regarding the student literature policy.

IT IS SO ORDERED this 31st day of October, 2007.

/s/
J. LEON HOLMES
UNITED STATES
DISTRICT JUDGE